

U.S. DEPARTMENT OF JUSTICE  
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Margarita D.L.G. Wonenberg, Melinda Brunson,  
Joseph Auther, Donald Hall and Wolf Calvert

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS**

John S. Pangelinan,

Plaintiff,

v.

David A. Wiseman, et al.,

Defendants.

**Civil Action No. 1:08-CV-04**

**Response to Plaintiff's *Ex Parte* Motion for Entry  
of Default Against Individual Federal Defendants**

The Honorable Frances M. Tydingco-Gatewood

COMES NOW the individual federal defendants, specifically: Chief Judge Alex Munson, Designated Judge David Wiseman, Assistant U.S. Attorney Craig Moore, Federal Probation Officers Margarita D.L.G. Wonenberg and Melinda N. Brunson, FBI Special Agent Joseph Auther, and Deputy U.S. Marshals Donald Hall and Wolf Calvert; by and through their undersigned counsel, and respectfully submit the following response in opposition to plaintiff's *Ex Parte* Motion for Entry of Default under Fed. R. Civ. P. 55(a).

**Introduction**

Plaintiff's *ex parte* motion seeking entry of a default judgment against the individual federal defendants is frivolous and should be denied, because the latter all filed a timely

1 motion to dismiss the claims against them without leave to amend in accordance with Fed.  
 2 R. Civ. P. 12.<sup>1</sup> In addition, plaintiff has failed to serve the U.S. Attorney General and  
 3 therefore service of process as to the individual federal defendants is presently insufficient.

4 **The Individual Federal Defendants' Response was Timely**

5 As the record reflects, plaintiff filed returns of service for the individual federal  
 6 defendants on February 1, 2008. *See* Docket Entries 2 and 6. *See also* Docket Entry 4  
 7 purporting to evidence service upon the United States of America via some unspecified  
 8 delivery method to the "Office of the U.S. District Attorney." Notably, plaintiff did not file  
 9 with the Court in this case a return of service indicating service on the Attorney General.<sup>2</sup>

10 Although Docket Entries 2 and 6 are unclear in some respects, the returns of service  
 11 filed there appear to state that some sort of personal service was attempted or effected upon  
 12 defendants Brunson and Hall on January 28, 2008, upon defendants Auther, Calvert,  
 13 Munson and Wiseman on January 29, 2008, and upon defendant Wonenberg on January 31,  
 14 2008.<sup>3</sup> Assuming personal service was accomplished on the dates indicated, the individual  
 15 federal defendants had sixty days to file an answer or otherwise respond to the Complaint.<sup>4</sup>

16 In this case, a motion to dismiss was filed on behalf of the individual federal  
 17 defendants on March 27, 2008, and that date is within sixty days of the plaintiff's earliest  
 18 purported service on these defendants. The individual federal defendants therefore filed a  
 19 timely response to the plaintiff's claims in accordance with Fed. R. Civ. P. 12(a)(3).

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20  
 21 <sup>1</sup> Indeed, the federal defendants motion to dismiss is currently scheduled for hearing  
 22 in Saipan, MP, on May 7, 2008, at 9:00 a.m. *See* Order of April 1, 2008 (Docket Entry 35).

23 <sup>2</sup> The significance of this failure is discussed *infra* at page 3.

24 <sup>3</sup> There is, however, no return of personal service filed for defendant Moore.

25 <sup>4</sup> Fed. R. Civ. P. 12(a)(3) provides that: A United States officer or employee sued in  
 26 an individual capacity for an act or omission occurring in connection with duties performed  
 27 on the United States' behalf must serve an answer to a complaint, counterclaim, or  
 28 crossclaim within 60 days after service on the officer or employee or service on the United  
 States attorney, whichever is later.

1 In his motion for entry of default, plaintiff asserts that the individual defendants had  
 2 only forty days (rather than sixty) to file an answer to the complaint because he served them  
 3 with a forty-day summons. While it does appear that plaintiff incorrectly used a forty-day  
 4 summons, his mistake does not alter the sixty-day response period of the Federal Rules of  
 5 Civil Procedure. Plaintiff's motion for an entry of default is therefore without merit.

#### 6 **Insufficiency of Service of Process Also Precludes An Entry of Default**

7 In further support of his claim for an entry of default, plaintiff cites to the outdated  
 8 holding in *Vaccaro v. Dobre*, 81 F.3d 854, 855 (9th Cir. 1996), for the proposition that he  
 9 was not required serve the United States in order for the Court to exercise jurisdiction over  
 10 the individually named federal defendants. However, the *Vaccaro* case has been overruled  
 11 by amendments to the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4 *Advisory*  
 12 *Committee Notes, 2000 Amendments*. As amended, the Fed. R. Civ. P. 4 provides that:

13 To serve a United States officer or employee sued in an individual capacity for  
 14 an act or omission occurring in connection with duties performed on the  
 15 United States' behalf (whether or not the officer or employee is also sued in an  
 official capacity) a party must serve the United States and also serve the  
 officer or employee under Rule 4(e), (f), or (g).

16 Fed. R. Civ. P. 4(i)(3). It is clear on the face of the Complaint that the individual federal  
 17 defendants are sued for acts or omissions occurring in connection with duties performed on  
 18 the United States' behalf, albeit in their individual capacities; therefore service on the  
 19 United States is required. Proper service on the United States requires service upon the U.S.  
 20 Attorney for the district in which the action is pending, and upon the U.S. Attorney General  
 21 in accordance with Fed. R. Civ. P. 4(i)(1). *See also* Fed. R. Civ. P. 4(m) (requiring dismissal  
 22 if service is not completed within 120 days after the complaint is filed unless good cause is  
 23 shown). Here, plaintiff has not served the U.S. Attorney General so service is insufficient.

#### 24 **Conclusion**

25 For the reasons stated above, plaintiff's *Ex Parte* Motion for Entry of Default Against  
 26 the Individual Federal Defendants Pursuant to Fed. R. Civ. P. 55(a) should be denied.

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2 Respectfully submitted,

3 JEFFREY S. BUCHOLTZ  
4 Acting Assistant Attorney General  
5 Civil Division

6 /s/ C. Salvatore D'Alessio, Jr.  
7 C. SALVATORE D'ALESSIO, JR.  
8 Senior Trial Attorney, Torts Branch

9 /s/ Virginia G. Lago  
10 VIRGINIA G. LAGO  
11 Attorney Advisor, Constitutional Torts Staff

12 Attorneys for the individual federal defendants

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13 **Certification of Service**

14 I certify that on April 30, 2008 (E.D.T.), this *Response to Plaintiff's Ex Parte Motion for*  
15 *Entry of Default against Individual Federal Defendants* was filed electronically. Notice of  
16 this filing will be sent by e-mail to all parties registered to receive electronic filing by  
operation of the court's electronic filing system. Parties not indicated to have been  
electronically served on the Notice of Electronic Filing will be served with a paper copy of  
this filing via regular first class U.S. mail, postage prepaid. Parties may also access this  
filing through the court's Case Management (CM) / Electronic Case Filing (ECF) system.

17 Signed: C. Salvatore D'Alessio, Jr.